

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SCOTT C. SMITH,

Plaintiff,

v.

GINA PENROSE, LT. CREWSE,  
RICHARD MORGAN, MARGE  
LITTRELL, LYNNE DELANO,  
ELDON VAIL, and JAMES  
HARTFORD,

Defendants.

NO. CV-06-0148-LRS

**ORDER DENYING PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT**

**BEFORE THE COURT** is Plaintiff's Motion for Partial Summary Judgment (**Ct. Rec. 45**), and Defendant's Cross-Motion for Partial Summary Judgment (**Ct. Rec. 60**). These motions came at issue without oral argument. After a detailed review of the pleadings submitted by both parties, this Court finds that Defendant Penrose is entitled to summary judgment dismissal as a matter of law.

**I. BACKGROUND**

Plaintiff is a Washington State prison inmate currently incarcerated at the Stafford Creek Corrections Center (SCCC). Plaintiff alleges that his Constitutional rights were violated when he

1 was sexually harassed by Defendant Penrose, and retaliated against by  
2 Defendants Crewse, Morgan, Littrell, Vail and Hartford for reporting  
3 the assault when he was incarcerated at the Washington State  
4 Penitentiary in Walla, Walla. See Complaint. (Ct. Rec. 1).

5 Plaintiff alleges that Penrose, a Department of Corrections  
6 Classification Counselor, attempted to "engage [Plaintiff] in sexual  
7 activity in exchange for a custody promotion, facility transfer and  
8 earned time credits." *Id* at 7. Plaintiff further alleges that, upon  
9 his refusal to engage in sexual activity with Defendant Penrose,  
10 Defendant Penrose threatened Plaintiff by telling him "you'll never  
11 get a promotion or transfer". *Id* at 7. Plaintiff alleges that the  
12 sexual assault violated his rights under the Eighth Amendment of the  
13 Constitution *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004))  
14 and was prohibited under RCW 9a.44.160. See Complaint.

15 Plaintiff further alleges that Defendant Penrose retaliated  
16 against him by making recommendations to deny a custody promotion,  
17 facility transfer, earned time credits, and by later inappropriately  
18 acting as the Classification Chairperson and approving her own  
19 recommendations.

20 Plaintiff also alleges that Defendants Crewse, Morgan, Littrell,  
21 Vail and Hartford unlawfully retaliated against him by intercepting  
22 and confiscating Plaintiff's mail on four occasions, threatening  
23 Plaintiff with isolation time and being labeled a 'snitch,' placing  
24 Plaintiff in involuntary protective custody, placing Plaintiff in  
25 Administrative Segregation, finding Plaintiff guilty of a disciplinary  
26

1 infraction, placing Plaintiff in disciplinary isolation for ten days,  
2 transferring Plaintiff to the IMU subjecting Plaintiff to repeated  
3 cell moves, searches, strip searches, and level demotions, and  
4 transferring Plaintiff to SCCC. *Id.*

5 Plaintiff's Motion for Partial Summary Judgment, and Defendant's  
6 Cross-Motion for Partial Summary Judgment deal solely with the claims  
7 against Defendant Penrose. Plaintiff claims that the documents he  
8 submitted, including several declarations from fellow inmates,  
9 claiming that Ms. Penrose sexually assaulted them, entitle him to  
10 summary judgment. See Plaintiff's Motion for Partial Summary Judgment  
11 (Ct. Rec. 45) and Plaintiff's Memorandum in Support of Motion for  
12 Partial Summary Judgment (Ct. Rec. 47).

13 Defendant Penrose argues that Mr. Smith's claims are barred by  
14 his failure to exhaust his administrative remedies, and that Mr. Smith  
15 has failed to state a claim because Ms. Penrose did not sexually  
16 assault the Plaintiff. (Ct. Rec. 60).

17 Defendant Penrose was the Classification Counselor for the  
18 Plaintiff in March 2005. Ct. Rec. 61 at ¶1. Classification  
19 Counselors' job duties include interviewing inmates concerning their  
20 classification level for their annual review pursuant to Department of  
21 Corrections Policy. *Id.* at ¶3. In early March 2005, Defendant Penrose  
22 interviewed Plaintiff for his annual review. During the course of the  
23 meeting, Mr. Smith became angry, and yelled at Ms. Penrose. *Id.* at 4.  
24 The classification interview took place in Ms. Penrose's office.  
25 Defendant Penrose's office chair sits directly in front of a large  
26

1 window, and the Plaintiff sat in a chair across from the prison  
2 official. Defendant Penrose's desk was in between Ms. Penrose and  
3 Plaintiff's chair. Ct. Rec. 61 at ¶10. The area in which Defendant  
4 Penrose's office is located consists of four counselor offices, one  
5 Unit Manager's Office, and one Sergeant's office. Ct. Rec. 61 at ¶11<sup>1</sup>.  
6 For safety reasons, inmates are not allowed within the services  
7 (office) area unless two or more staff members are also present. *Id*  
8 at ¶13. The record reflects that Heidi Garrison was in her office  
9 across from Ms. Penrose at the time the meeting with Mr. Smith  
10 occurred. Ct. Rec. 60 at ¶15. Ms. Garrison observed Plaintiff  
11 yelling at Ms. Penrose. *Id* at 16. She did not observe Defendant  
12 Penrose touching Plaintiff at any point. *Id*.

13 After the meeting, Ms. Penrose recommended that Mr. Smith remain  
14 at close custody until he demonstrated positive behavior without  
15 placement in segregation in the IMU. The prison official's decision  
16 was based on information gathered from Mr. Smith during the interview  
17 process and the information in the inmate's central file. Declaration  
18 of Penrose at ¶15.

19 The Washington State Department of Corrections has an Offender  
20 Grievance Program, which was first established in the early 1980s.  
21 Ct. Rec. 61, Exhibit 3, Declaration of Devon Shrum at ¶3. Inmates  
22 have 20 days in which to grieve an issue. *Id*. The Grievance Process

---

23  
24 <sup>1</sup>The Court notes that the photographs submitted by the Department of  
25 Corrections support Defendant's position that this is an open area where  
26 the actions of individuals, if any would be highly visible.

1 has four levels of review. *Id* at ¶6. The record shows that Mr. Smith  
2 is familiar with the grievance process, having filed 30 grievances  
3 between March 5, 2005 and May 31, 2006. *Id* at ¶11. Mr. Penrose filed  
4 a grievance concerning an alleged sexual assault on December 30, 2005  
5 more than nine months after Plaintiff alleges the assault occurred.  
6 *Id* at ¶12.

## 7 II. DISCUSSION

### 8 A. Legal Standards

#### 9 1. *Summary Judgment*

10 Summary judgment is proper only if "the pleadings, depositions,  
11 answers to interrogatories, and admissions on file, together with the  
12 affidavits, if any, show that there is no genuine issue as to any  
13 material fact and the moving party is entitled to judgment as a matter  
14 of law." Fed.R.Civ.P. 56c. The moving party bears the burden of  
15 proving that no genuine issue of material fact exists. *See Matsushita*  
16 *Elec. Indus. Co. V. Zenith Radio Corp.*, 475 U.S. 574, 586 n. 10  
17 (1986). "Facts that could alter the outcome are 'material,' and  
18 disputes are 'genuine,' if evidence exists from which a rational  
19 person could conclude that the position of the person with the burden  
20 of proof on the disputed issue is correct." *Horowitz v. Fed. Kemper*  
21 *Life Assurance Co.*, 57 F.3d 300, 302 n. 1 (3d Cir. 1995) (internal  
22 citations omitted). If the moving party has demonstrated an absence  
23 of material fact, the nonmoving party then "must come forward with  
24 'specific facts showing that there is a genuine issue for trial.'"  
25 *Matsushita*, 475 U.S. at 587 (quoting Fed.R.Civ.P. 56(e)). The court  
26

1 will "view the underlying facts and all reasonable inferences  
2 therefrom in the light most favorable to the party opposing the  
3 motion." *Pa. Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir.1995).  
4 The mere existence of some evidence in support of the nonmoving party,  
5 however, will not be sufficient for denial of a motion for summary  
6 judgment; there must be enough evidence to enable a jury reasonably to  
7 find for the nonmoving party on that issue. *See Anderson v. Liberty*  
8 *Lobby, Inc.*, 477 U.S. 242, 249 (1986). Mere disagreement or the bald  
9 assertion that a genuine issue of material fact exists will not  
10 preclude the use of summary judgment. *California Architectural*  
11 *Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466,  
12 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988). If the  
13 nonmoving party fails to make a sufficient showing on an essential  
14 element of its case with respect to which it has the burden of proof,  
15 the moving party is entitled to judgment as a matter of law. *Celotex*  
16 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

17 **2. 42 U.S.C. § 1983**

18 To state a claim under 42 U.S.C. § 1983, at least two elements  
19 must be met: (1) the defendant must be a person acting under color of  
20 state law, (2) and his conduct must have deprived the plaintiff of  
21 rights, privileges or immunities secured by the constitution or laws  
22 of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).  
23 Implicit in the second element is a third element of causation. *See*  
24 *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 286-87, (1977);  
25 *Flores v. Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980), cert.

1 *denied*, 449 U.S. 975 (1980). When a plaintiff fails to allege or  
2 establish one of the three elements, his complaint must be dismissed.

3 **B. Plaintiff Failed to Exhaust His Administrative Remedies**

4 The Prison Litigation Reform Act mandates that:

5 No action shall be brought with respect to prison conditions  
6 under section 1983 of this title, or any other Federal law,  
7 by a prisoner confined in any jail, prison, or other  
correctional facility until such administrative remedies as  
are available are exhausted. 42 U.S.C. § 1997 e (a).

8 As counsel for the Department of Corrections correctly point out,  
9 the United States Supreme Court recently reaffirmed that proper  
10 exhaustion of administrative remedies is a requirement before a  
11 prisoner may bring a lawsuit. *Woodford v. Ngo*, 126 S.Ct. 2378, 2385  
12 (2006). This includes complying with any timing requirements to  
13 participate in the grievance process. (In *Woodford*, California  
14 inmates had 15 days in which to grieve an incident.) As the Supreme  
15 Court stated, "The benefits of exhaustion can be realized only if the  
16 prison grievance system is given a fair opportunity to consider the  
17 grievance....A prisoner who does not want to participate in the prison  
18 grievance system will have little incentive to comply with the  
19 system's procedural rules unless noncompliance carries a sanction."  
20 *Id* at 2388.

21 In addition, the United States Supreme Court has determined "that  
22 the PLRA's exhaustion requirement applies to all inmate suits about  
23 prison life whether they involve general circumstances or particular  
24 episodes, and whether they allege excessive force or some other  
25 wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

1 In the case currently before this Court, Mr. Smith did not grieve  
2 the alleged sexual assault until nine months after the alleged  
3 incident occurred. Therefore, under *Woodford*, Plaintiff's claims  
4 against Ms. Penrose are barred, and must be dismissed.

5 **C. Plaintiff's Retaliation Claim Fails.**

6 This Court agrees with Defendant Penrose that Plaintiff cannot  
7 demonstrate that retaliation was a substantial or motivating factor  
8 behind the Classification Counselor's recommendation that Mr. Smith  
9 remain at close custody until he demonstrated positive behavior and  
10 programming. Ct. Rec. 60 at 11.

11 The Ninth Circuit has long held that, though prisoners do not  
12 have a constitutional right to particular custody level or facility  
13 placements, transfers and demotions may violate a prisoner's First  
14 Amendment rights if they are motivated by a desire to curtail a  
15 prisoner's protected speech activities. *Pratt v. Rowland*, 65 F.3d  
16 802, 806 (9th Cir. 1995). To find that such a violation has occurred,  
17 Plaintiff must show that "the prison authorities' retaliatory action  
18 did not advance legitimate goals of the correctional institution or  
19 was not tailored narrowly enough to achieve such goals." *Id.*  
20 Plaintiff must also show that his constitutional rights were actually  
21 chilled. *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000).  
22 Retaliation claims must be evaluated with the deference accorded to  
23 prison officials. *Pratt*, 65 F.3d at 807. Absent factual support,  
24 bare allegations of retaliation are insufficient. *Rizzo v. Goode*, 423  
25 U.S. 362, 378 (1976). The record supports Defendant Penrose's  
26



1 position that the reason that Mr. Smith was not promoted to a lower  
2 custody (less restrictive) level included his behavior and the  
3 material contained in the Plaintiff's central file, not because of any  
4 retaliation or animosity Ms. Penrose harbored for the Plaintiff.  
5 A plaintiff's belief that a defendant acted from an unlawful motive,  
6 without evidence supporting that belief, is no more than speculation  
7 or unfounded accusation about whether the defendant really did act  
8 from an unlawful motive." *Carmen v. San Francisco Unified School*  
9 *Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001). In addition, the Court  
10 notes that Plaintiff cannot show any injury because of Defendant  
11 Penrose's recommendation. Inmates may appeal their Classification  
12 decisions through five levels of review within the Washington State  
13 Department of Corrections. Ct. Rec. 61 at ¶ 31. Plaintiff's fourth  
14 level of review was performed by Correctional Program Manager Carla  
15 Schettler, who did not concur with Defendant Penrose's  
16 recommendations, and changed them to allow Plaintiff to promote to  
17 medium custody after Plaintiff completed the review process. *Id* at ¶  
18 33.

### 19 III. CONCLUSION

20 For the reasons explained above, **IT IS HEREBY ORDERED:**

21 1. Defendants' Motion for Partial Summary Judgment (**Ct. Rec 60**)  
22 is **GRANTED**. All of Plaintiff's claims against Defendant Penrose are  
23 **DISMISSED WITH PREJUDICE**.

24 2. Plaintiff's Motion for Partial Summary Judgment (**Ct. Rec.**  
25 **45**) is **DENIED**.

ORDER - 10